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2010]

PERSONS ALL THE WAY UP

STEVEN D. SMITH*

I.

MY first personal encounter with Joseph Vining—personal in the face-to-face sense—occurred some years ago when I spent a semester at the University of Michigan. Joe and I were in some respects from quite different worlds, but we seemed to have converging concerns, interests, and questions, and so we began to meet regularly for lunch and conversation. We talked about law, and life, and faith—for Joe, of course, these subjects are not really severable¹—and I felt I began to gain some limited comprehension (and I emphasize the *limited*) of his way of thinking, which had previously been for me pretty much inscrutable. A decade-and-a-half (and untold conversations) later, I still struggle to comprehend what Joe is thinking, and to figure out what I think about it.² As I now understand, the purpose of much of Joe’s work is precisely to induce just this sort of reflection.

During one lunch conversation, I ventured to ask Joe whether he believed in God. I recall his answer (though I’m not sure he would give the same answer today). “I can say this much—” Joe said, carefully, even gravely, and it seemed to me a bit regretfully, “that I can’t *not* believe. Isn’t that the same as believing?” I wasn’t sure.

I’m still not sure. But I’ve come to realize that this answer was indicative of Joe’s approach to some of the most urgent, central questions. It is an approach which I believe to be distinctive, and also illuminating and valuable, and so I want to discuss Joe’s answer and some related matters a bit more in this short essay.

* © Steven D. Smith, 2010. Warren Distinguished Professor of Law, University of San Diego. This essay was written for the fourth annual John F. Scarpa Conference, held at Villanova University on October 22, 2009, and dedicated to considering the work of Joseph Vining. I thank Patrick Brennan, Michael Perry, and participants in the Scarpa Conference for helpful comments.

1. See, e.g., JOSEPH VINING, FROM NEWTON’S SLEEP 5 (1994) (“Such is the connection between law, mind, and cosmology that they are aspects of the same . . .”).

2. For me (and I’ve told him this), reading Joe’s work is a little like reading the book of *Isaiah*. There are long stretches that are beautifully written and manifestly rich with insight and wisdom—except that I have only the vaguest understanding of what he’s saying. It’s over my head. And then I come to a passage of lucid, rare, extraordinary insight that at least partly illuminates the rest and makes the whole exercise rewarding.

II.

Let me start by noticing a series of different but related and overlapping dichotomies that run through much of our thinking and our language. *Person* and *thing*. *Subject* and *object*. *Mind* and *matter*. *I—it*. A central part of our efforts to grasp and to act in and upon the world consists of placing the various entities we encounter on one side or the other of these associated lines.

Nor is it predetermined that any particular entity or phenomenon must fall into any particular category. Often, perhaps always, we have some freedom in the matter: we can place something on the “personal,” mindful, subjective side of the line, or on the “impersonal,” objective side. We can “personify” or we can “objectify,” or “reify.” And there are consequences to this placement, because each category has its distinctive qualities, and hence its distinctive attractions and limitations.

The “object” category offers solidity, reliability, predictability. Objects—think of rocks—behave according to regular, knowable laws. They stay put (unless someone or something comes along to move them). They are, at least in principle, subject to our control.

Entities in the “subject” or “personal” category lack these reassuring features, but they have their own compensating virtues. They possess the ability to have intentions, and to make choices, and to have and convey meanings. They are capable of caring, and of believing. Mere objects—rocks, for instance—cannot do these things (unless we “personify” them).

So for different purposes, one of the categories can be more convenient or attractive than the other. If you are mostly concerned about acquiring the sort of knowledge that will provide a comforting certainty, and that will allow you to predict and control things and events, this concern will likely lead you to squeeze as much of life and the world as possible into the “object” category. Conversely, if you feel the need for genuine friendship, for instance, it will be more helpful to find something—or rather *someone*—with a subjective, personal nature, and to treat that someone *as* a person, not (as is entirely possible) as an object to be explained, predicted, and controlled.

In ordinary day-to-day life, most of us are, by habit or inclination or even reflection, dualists: we instinctively or sometimes deliberately regard some entities or phenomena as subjective or personal and others as objective. Your mother is a person. So, hopefully, is your secretary. Your car and your computer are objects—usually anyway (because you may sometimes talk to them, or curse at them, or plead with them).

Despite this dualism at the level of practice, though, most of us also treat (consciously or tacitly) one of the categories as primary or ultimate, and the other as subordinate or derivative. One place this priority can appear is in our account of the origins of everything. Thus, in Plato’s *Laws*, the Athenian describes two kinds of views that people take regarding this question of primacy. Some people hold that “fire and water, earth

and air, are the most primitive origins of all things,” and that “soul is a later derivative from them.” Consequently, the world and its contents are generated “not . . . by the agency of mind, or any god, or art, but . . . by nature and chance.” This is the more common view, the Athenian explains, “widely broadcast, as we may fairly say, throughout all mankind” and propagated by “men who impress the young as wise.” By contrast, the other view—the one embraced by the Athenian himself—holds that “soul came first” and that “nature” is in fact “secondary and derivative from art and mind.”³

It is characteristic of views that we describe as “religious” to give priority to the mindful or personal side. In the beginning, God (a person) created the world (consisting of, among other things, objects).⁴ In the beginning was the Word, the Logos.⁵ And at least part of what was created—especially including us—was made “in the image of God,”⁶ and hence shares God’s personal quality. Conversely, the overwhelmingly dominant attitude in the academy over the last century or so has been to give priority to the objective. Matter came first, and more complex entities (including persons, and mind) evolved out of that primordial raw material. This perspective is often described as “naturalism,” and although the term is of uncertain and contestable scope,⁷ it will be convenient to use that term. The so-called hard sciences are thought to take a naturalistic perspective pretty much for granted (though perhaps only a “methodological naturalism”⁸); indeed, their devotees may treat adherents of the contrary perspective with contempt or incomprehension.⁹ Other disciplines, envious, have often tried to follow what they take to be science’s example, or to be “sciences” themselves.¹⁰

Thus, in a recent book seeking to unsettle this situation at least in a mild way, the editors explain that “[a]n overwhelming majority of American philosophers claim to be ‘naturalists’ or to be offering a ‘naturalistic’ theory”¹¹ Hilary Putnam describes the common practice by which

3. PLATO, *The Laws: 889b-892c*, in *THE COLLECTED DIALOGUES* 1225, 1446 (Edith Hamilton & Huntington Cairns eds., A. E. Taylor trans., 1961).

4. *Genesis* 1:1.

5. *John* 1:1.

6. *Genesis* 1:26-27.

7. See generally Mario de Caro & David MacArthur, *Introduction: The Nature of Naturalism*, in *NATURALISM IN QUESTION* 1 (2004).

8. For a discussion emphasizing the difference between methodological and ontological naturalism, see Barry P. McDonald, *Getting Beyond Religion as Science: “Unstifling” Worldview Formation in American Public Education*, 66 WASH. & LEE L. REV. 587, 604, 627-30 (2009).

9. See, e.g., Philip Kitcher, *Born-Again Creationism*, in *ARGUING ABOUT RELIGION* 567 (Kevin Timpe ed., 2009).

10. Cf. Philippe Nonet, *Philosophy? In American Law?*, in *ON PHILOSOPHY IN AMERICAN LAW* 265, 265 (Francis J. Mootz III ed., 2009) (referring to “the nearly transparent disguise of the so-called ‘sciences of man’”).

11. De Caro and MacArthur, *supra* note 7, at 2.

philosophers . . . announce in one or another conspicuous place in their essays and books that they are “naturalists” and that the view or account being defended is a “naturalist” one; this announcement, in its placing and emphasis, resembles the placing of the announcement in articles written in Stalin’s Soviet Union that a view was in agreement with Comrade Stalin’s; as in the case of the latter announcement, it is supposed to be clear that any view that is not “naturalist” (not in agreement with Comrade Stalin’s) is anathema, and could not possibly be correct.¹²

Indeed, a great deal of modern academic work has consisted precisely of the effort to “naturalize” one subject or another that might intuitively seem more subjective or personal—mind, or morality, or persons themselves. Hence Sidney Morgenbesser’s comment to B. F. Skinner: “Let me see if I understand your thesis. You think we shouldn’t anthropomorphize *people*?”¹³

I think it is fair to say that a major purpose of Joe’s work—perhaps *the* central purpose—has been to resist this way of thinking. Joe does not deny nature, of course, and he is not opposed to science. Quite the contrary: he sees profound goodness and beauty in them.¹⁴ I am not sure whether he has any objection to a duly constrained and humble version of “methodological naturalism.”¹⁵ His resistance, rather, is to what he sometimes calls “total vision,” or “single vision”—the idea that the universe is composed “merely” (a word he finds ominous) of the sorts of objective entities that figure in scientific explanations. Thus, he quotes John Searle’s contention that the world “consists entirely of physical particles in fields of force, and . . . some of these particles are organized into systems that are conscious biological beasts, such as ourselves.” Searle goes on to explain that “the simple intuitive idea is that systems are collections of the particles where the spatio-temporal boundaries of the system are set by causal relations. . . . Babies, elephants, and mountain ranges are . . . examples of systems.”¹⁶ This is the sort of single or total vision—a reductionist vision—that Joe opposes.

12. Hilary Putnam, *The Content and Appeal of “Naturalism,”* in NATURALISM IN QUESTION, *supra* note 7, at 59, 59.

13. James Ryerson, *Sidney Morgenbesser [b. 1921]; Sidewalk Socrates*, N.Y. Times, Dec. 26, 2004, available at <http://query.nytimes.com/gst/fullpage.html?res=9400E1D81330F935A15751C1A9629C8B63&sec=&spon=&pagewanted=all> (emphasis added).

14. See, e.g., JOSEPH VINING, *THE SONG SPARROW AND THE CHILD: CLAIMS OF SCIENCE AND HUMANITY* 81 (2004) (declaring that “science brings gifts, of fascination, of beauty, of relief from pain, gifts of unclouded thought, of freedom to love; and in fact these gifts and their effects are enjoyed even by those who live in a world whose material constitution they deny”).

15. See McDonald, *supra* note 8, for a discussion of “methodological naturalism.”

16. VINING, *supra* note 14, at 8.

Elsewhere, Joe describes the kind of thinking that concerns him as “mathematical thought.”¹⁷ Again, though, the problem is not with mathematics per se, but with a form of thinking that is elevated into a “credo”¹⁸—a creed committed to “the axiomatic impersonality of the world”¹⁹ and hence to “the axiomatic elimination of the person”²⁰ and of “transcendence” or the “mysterium tremendum.”²¹ In this creed, Joe detects “a form of death, a giving up, a farewell”²² to all that is meaningful and caring and good. It is this sort of creed, he suggests, that animated some of the atrocities of the twentieth century in which human beings were treated simply as objects for scientific experimentation.²³

In resisting naturalist thought (which I will use here as a shorthand for totalistic and “objectivist” creeds in general) in favor of a more personalist view, Joe is unusual in our time, but he is hardly alone. What is distinctive, perhaps unique, is that he sets up his base of resistance not primarily in religion, or even in the humanities, but rather in what many would see as a most improbable place—law. Indeed, though he has sometimes pointed out the analogy between legal and theological discourse,²⁴ Joe resists any quick move to religion. Speaking (I take it) from his own experience and struggles, he seems to view law and legal discourse as more sure and more generally accessible than religion and theological discourse.²⁵

Law seems an unlikely base for personalism because it is often thought of as having, or at least aspiring to, an “objective” quality: indeed, the very ideal of “rule of law *not of men*” suggests an aspiration to eliminate the personal from governance and from judging.²⁶ Many have aspired to

17. See VINING, *supra* note 1, at 248.

Mathematical thought is translation of reality into process or system, which axiomatic exclusion of substance that might transcend any process or system. Materialism may be implicit in it, but its spread to linguistics, literary criticism, social theory, to the psychology of mind and even to theology makes “scientific thought” too narrow a term for it.

Id.

18. *Id.* at 181.

19. *Id.* at 187.

20. *Id.* at 241.

21. *Id.* at 329.

22. *Id.* at 20.

23. See generally VINING, *supra* note 14, at 20.

24. See, e.g., JOSEPH VINING, *THE AUTHORITATIVE AND THE AUTHORITARIAN* 187-92 (1986).

25. See, e.g., Joseph Vining, *Legal Commitments and Religious Commitments*, 44 SAN DIEGO L. REV. 69, 82 (2007).

26. See, e.g., LARRY ALEXANDER & EMILY SHERWIN, *THE RULE OF RULES* (2001); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989). To be sure, our legal tradition has also supported a prominent strand of skepticism, often called “legal realism,” which stresses the ineradicable personal element in judicial decisions, but legal realism is typically understood not so much as a rival conception of what “law” is as a challenge to or subversion of the aspiration to rule of “law.” Moreover, legal realists have not exhibited any commitment to personal-

make law a “science.”²⁷ And prevalent modern accounts of legal interpretation typically insist that the meaning of legal texts is determined by something objective, such as the “rules of language.”²⁸ The effort, as Joe observes, is “to make law a machine.”²⁹

Joe has a contrary view. In his understanding, law, legal discourse, legal meaning, legal authority, and even something as technical and arcane as the law of standing, are pervasively and essentially personal.³⁰ “No lawyer,” he remarks, “can point to an *it*.”³¹ Indeed, he suggests that among the various disciplines, including even the so-called social or human sciences, law is the one discipline that has not discarded and cannot discard the person.³² And if law is personal, the implications cannot be neatly contained. That is because, for Joe, law and legal discourse offer a window into the universe. Or maybe it would be better to say that law pervades and is coextensive with the universe.³³ As a result, Joe’s personalist understanding of law implies a personalist understanding of the cosmos at large.

So the first and last thing we know, the ultimate object of knowledge and belief, is a person, not a principle. . . . This is what we know, what is real, what has meaning.³⁴

“This is what we know . . .” But *do* we actually know this? How? With these questions we come to another distinctive and intriguing aspect of Joe’s thinking, and to a point where he parts ways with most other thinkers who join with him in resisting the prevailing naturalism.

ism in any very substantial sense; they have often sought merely to replace *legal* “science” and legal reasoning with *social* science.

27. For a learned but derisive study of this aspiration, see GRANT GILMORE, *THE AGES OF AMERICAN LAW* (1977).

28. See, e.g., Lawrence B. Solum, *Constitutional Texting*, 44 SAN DIEGO L. REV. 123, 123 (2007).

29. VINING, *supra* note 24, at 5. For the record, although I myself am entirely sympathetic to Joe’s overall project, as I understand it, and skeptical of the notion that law is or could be or should be a “science,” I also happen to believe that there is considerable value— even “moral” value, if you like, or value *for persons*—in the “rule of law” aspiration to make law “objective.”

30. I have tried to summarize this view elsewhere. See STEVEN D. SMITH, *LAW’S QUANDARY* 170-75 (2004). On the law of standing, see JOSEPH VINING, *LEGAL IDENTITY* (1978).

31. VINING, *supra* note 1, at 241.

32. *Id.* at 208, 210.

33. See VINING, *supra* note 24 at 70-71; see also VINING, *supra* note 1, at 323: The ideal of a limited law is flawed at its base. It presumes a natural order into which there can be “intervention,” when in fact there is no such natural order, no area of liberty that might be constrained or not according to whether decisions of law are applicable.

34. VINING, *supra* note 1, at 201.

III.

Those who want to resist naturalism typically do so by making arguments calculated to demonstrate the existence of something beyond what naturalism acknowledges, or perhaps to show that naturalism (at least its more militant moods) is self-undermining or false. Insofar as naturalism denies the existence of God, for instance, theists may make arguments designed to show that God *does* exist. The arguments may be quasi-empirical or quasi-scientific in character, as in the so-called Argument from Design, which seems to have gained new interest on the basis of scientific evidence suggesting an “anthropic principle” in the universe’s design.³⁵ Or the arguments may be more purely conceptual or logical in character, as in the so-called Ontological Argument developed by St. Anselm and others.³⁶ If these arguments are persuasive (and this is of course a large and fiercely contested *if*), the more self-aggrandizing and censorious versions of naturalism would be thereby refuted.

It is understandable that theists would proceed in this way, which we can call “rationalist.” For one thing, naturalists themselves typically revere, and purport to speak the language of, “reason,” and if you are going to join issue with someone it is convenient if you can speak his language. For another, if the arguments for God are successful, they would provide what believers and others naturally desire—certainty or at least warranted confidence regarding the truth of theism.

Joe, by contrast, does not employ this rationalist method. I think he is suspicious of it. Indeed, he may see it as capitulating to the very sort of objectivist ontology that the personalist is trying to resist, in a couple of ways.

First, the rationalistic approach could be viewed as attempting to coerce assent—to use reason to compel one’s opponent to assent to a proposition he is not inclined to accept. This tactic may seem akin to the manipulation or compulsion that Joe understands to be “authoritarian” rather than “authoritative,” and that is objectionable precisely because it does not treat its subjects as persons but rather as things to be manipulated and controlled.³⁷ I am not sure whether Joe would make this criticism, or whether the criticism is valid. But some such reservation seems to

35. See, e.g., Robin Collins, *A Scientific Argument for the Existence of God: The Fine-Tuning Argument*, in *ARGUING ABOUT RELIGION*, *supra* note 9, at 147. See also JOHN POLKINGHORNE, *BELIEF IN GOD IN AN AGE OF SCIENCE* 6-10 (1998).

36. ANSELM OF CANTERBURY, *Proslogion*, in *THE MAJOR WORKS* 88-89 (Brian Davies & G. R. Evans eds., 1998). For a critical discussion of various versions of the argument, see Peter van Inwagen, *Necessary Being: The Ontological Argument*, in *ARGUING ABOUT RELIGION*, *supra* note 9, at 101.

37. The difference between the authoritative and the authoritarian, Joe explains, is the difference “between a system that treats us as if we were objects, and which we therefore resist and push against and rightly see as one in which we have no place which therefore cannot be part of us, and a system which, instead of manipulating us, seeks to embrace us.” See VINING, *supra* note 24, at 145. Indeed, the authoritative cannot ultimately be a mere “system” at all, but must be a person

be contained in Joe's explanation that his method is not to move "from proposition to proposition" or to compel assent through argument. "Binding you to me by successful moves of my mind would lose all that can be hoped for."³⁸

Second, the rationalist method in a sense may seem to embrace the very objectivism it attempts to resist by treating matters under consideration as "object-like" entities. Thus, the rationalist thinker deals in *propositions, claims, concepts, theories*. Just what the ontological status of these entities is, or how they fit into an overall naturalist framework, is often less than clear. What sort of thing is a "concept," exactly? A sort of mental state? A localized linguistic practice? A Platonic form?

I don't know, and so I want to speak tentatively. Still, in standard academic discourse it often at least looks like these entities are somehow just "there." They seem to float free of, and to be examinable and to stand or fall without reference to, the persons who may be said to "hold" or "believe" or "embrace" them. Moreover, through analysis and definition the rationalist tries to make these entities as clear and distinct—as sharply object-like—as possible. Thus, in the rationalist exercise, *persons* recede from view, and the field is occupied by an array of seemingly impersonal *ideas*, propositions, and arguments that, like chemicals in a test tube, interact to combine with or neutralize each other, and thus to produce as a residue or product some impersonal, object-like conclusion.

In trying to describe Joe's thinking, by contrast, I have attempted to avoid talking about propositions, and although I have had to use words like "idea" and "view," I suspect that even these words subtly distort. In fact, Joe seems interested not in concepts or propositions, but in what are more like actual qualities of persons. Believing is inherently personal: thus, Joe describes "the separation of self from ideas" as "the fundamental error."³⁹ A belief, it seems, is like a smile: severed from the person who believes, or who smiles, these things simply vanish. They are nothing at all.

Nor has Joe to my knowledge ever offered a "theory" of anything. I suspect he would concur with the character in Hawthorne's story "The Hall of Fantasy" who says:

"Come," said I to my friend, . . . "let us hasten hence, or I shall be tempted to make a theory—after which, there is little hope for any man."⁴⁰

In sum, Joe's approach to naturalism and similar matters is not rationalistic but rather personalistic in character. He is personalist not only in with the qualities of caring, sincerity, and mindfulness. See *id.* at 157, 167-68, 231-32.

38. See VINING, *supra* note 14, at 2.

39. See VINING, *supra* note 1, at 10.

40. NATHANIEL HAWTHORNE, *The Hall of Fantasy*, in *SELECTED TALES AND SKETCHES* 246, 255 (1987).

his substantive views and commitments but in his method as well. He defends personalism in a thoroughly personalist way.

IV.

So, how does this personalist approach to understanding and knowledge work? I have suggested elsewhere that for Joe, the purpose of reflection is similar to what it was for Michael Polanyi (whose influence Joe acknowledges⁴¹) in a book aptly entitled *Personal Knowledge*. I believe, Polanyi declared,

that the function of philosophic reflection consists in bringing to light, and affirming as my own, the beliefs implied in such of my thoughts and practices as I believe to be valid; that I must aim at discovering what I truly believe in and at formulating the convictions which I find myself holding; that I must conquer my self-doubts, so as to retain a firm hold on this programme of self-identification.⁴²

We might try to express the difference between the rationalist and personalist approaches by saying that in the rationalist approach, the featured question is “What is true?”, while in the personalist approach the central question is “What do I (really) believe?” This contrast probably overstates the difference, because it seems that each question is necessarily implicit in the other: to affirm that something is *true* is implicitly to say that *you believe* it is true, and to say that *you believe* something is to affirm that *you believe* it is *true*. Even so, the primary focus of the approaches is different.

Thus, for Joe the question of truth is absorbed into the project of determining “what I believe,” and the quest for what I believe in turn seems essentially the same as the project of figuring out “who I am.” It is all a faithful response to the Delphic and Socratic exhortation to “Know thyself.” Nor is this any modest or lazy quest. Self-knowledge is dauntingly difficult to achieve. “We hardly know ourselves,” Joe remarks,⁴³ and he suggests (and I am inclined to concur) that genuine self-knowledge is spectacularly absent in—indeed, it is virtually precluded by the very terms and working assumptions of—much contemporary thought.

Although Joe’s approach is essentially personalist in nature, however, it is not solipsistic in the way my description thus far may have implied. On the contrary, Joe stresses that the search for what you and I believe is a joint, social enterprise. The prescription is not for navel-gazing but rather conversation and mutual interrogation. Our own beliefs, he suggests, are not immediately and infallibly known to us; rather we discover (and in

41. See generally VINING, *supra* note 30.

42. MICHAEL POLANYI, *PERSONAL KNOWLEDGE: TOWARDS A POST-CRITICAL PHILOSOPHY* 267 (1958).

43. See VINING, *supra* note 1, at 344.

part construct) them by examining what we *think* we believe, how we speak, and how we act,⁴⁴ and this quest is one in which we help each other—often by engaging in a sort of mutual cross-examination.⁴⁵

Hence the lunchtime conversations. Hence this conference.

So how does this personalist method connect to personalism in one's substantive views or beliefs? Here there is no substitute for reading Joe's books and working through his questions and reflections. Elsewhere I have tried to distill down some of his thinking⁴⁶ (the part that I've managed to grasp, or think I have), but here, with apologies, I will go straight to the conclusion. Joe thinks that the quest for self-knowledge will show, not that naturalism is false, exactly, but that we—most of us, at least—do not actually believe it.

We may, some of us, *say* we believe it. And if we say this we are not lying, exactly. But neither are we speaking entirely authentically. We are likely speaking from instilled habit, or from the pressure of a theory or ideology, or under the stern and censorious tutelage of our time. But if we examine our language, we find that the personal just keeps slipping back in, despite efforts to exclude it.

Thus, Joe's work is filled with such instances in which a person's words, upon close inspection, betray a belief quite the opposite of what she thinks she is trying to say.⁴⁷ In addition, if we examine the ways we live—what we are willing to do or not do, what we praise and deplore—we find that we believe in more than we are willing to acknowledge. Again, Joe's work is filled with supporting examples.⁴⁸

The point of these examples, once again, is not to convict people of self-contradiction and thereby to compel them to disavow previous opinions. The goal, rather, is to reveal what people genuinely believe. If we pay close attention, Joe thinks, we find that we “can't not believe” (as he put it in his answer to my question about God) in some of the things we often publicly deny.

Joe's personalist method is arguably more consonant than the rationalist approach is with the personalist views he defends. It is also more unusual, even idiosyncratic, which in part helps to explain the difficulty that many (including me) sometimes have in appreciating what he is saying. It is an intriguing, and valuable, approach, I believe. But I also wonder whether the personalist method generates problems of its own.

44. *See id.* at 128, 130, 189.

45. *See, e.g.,* VINING, *supra* note 14, at 16-17.

46. *See* SMITH, *supra* note 30, at 170-75; Steven D. Smith, *Science, Humanity, and Atrocity: A Lawyerly Examination*, 104 MICH. L. REV. 1305 (2006).

47. *See, e.g.,* VINING, *supra* note 1, at 136, 140, 145, 176, 187, 249.

48. *See, e.g.,* VINING, *supra* note 14, at 136. (“But Searle would stay his hand from vivisectioning a human being or pulling out a dog's nails with pliers and then burning it alive In staying his hand, he would reveal much.”).

V.

More specifically, I wonder whether there is something self-subverting about a more or less conscious decision to focus on “what I believe” in contrast to asking directly “what is true?” I’m honestly not sure what to think about this issue. Thus, I’ve already said that these questions are not mutually exclusive, but rather implicitly contain each other. And I enthusiastically agree that there is much to be gained by emphasizing that it is we human beings—we mortal, fallible, finite, physically and historically and linguistically embodied and hence limited *persons*—who are asking the questions, conducting the inquiries, and formulating the answers. Thinking that tries to ignore this vital feature of our inquiries and our knowing is likely to go astray in debilitating, embarrassing ways: I happen to believe that contemporary political and ethical thought is strewn with the often quite impressive wreckage caused by this error. Even so, isn’t there something worrisome about foregrounding the question of “what I believe” and backgrounding the question of “truth”?

If we make our *beliefs* the central object of our inquiries, is there any reason to be confident that, even if our inquiries are successful and we manage to discover/construct what we believe, we will have found *truth*? We might after all be repositories of error, or deception, or self-deception. We might be the dupes of Descartes’s mischievous deceiving genie. We might be the children of traditions distorted by power, prejudice, or ignorance. Or we might be “hard-wired,” as they say, to believe in a set of useful, survival-enhancing falsehoods.

Two aspects of Joe’s personalist approach may underscore the concern. First, Joe often stresses that the impersonalist world of the naturalist creed deprives us of ultimate meaning and leaves us with “[m]adness, self-destruction, death, and senseless command.”⁴⁹ For myself, I think Joe is essentially right about this, though of course many would dispute this view. Either way, though, the observation can provoke the suspicion that our beliefs are being shaped more by desperation than by what we might call epistemically legitimate factors. Who is to say that we are not like the person who thinks “I *have* to believe that so-and-so loves me, because otherwise my life would be barren and miserable; I just couldn’t go on”? How reliable is that sort of belief? And once we call attention to this aspect of our believing, as Joe does, will the believing not tend to undermine itself? Why should I trust what I believe if I come to understand that my believing may be influenced by my revulsion against a world of “[m]adness, self-destruction, death, and senseless command”?

Second, Joe often says that we do not merely *discover* what we believe; we *construct* our beliefs. Indeed, he says that persons themselves are constructed, or “created.”⁵⁰ More specifically, a person is formed and shaped by loving, caring, and believing. Consequently, “for the individual there

49. See VINING, *supra* note 1, at 47.

50. *E.g.*, SMITH, *supra* note 30, at 143, 144, 155; VINING, *supra* note 1, at 145.

are no objective characteristics that define who he is.”⁵¹ Instead, “[a] human being ‘has’ an identity,” Joe observes, “by virtue of his love of a thing or belief in a thing”⁵² “Each of us is the embodiment of a value or a set of values.”⁵³

There is an admirable consistency here: persons themselves have a personal, not an objective, ontological status. Persons are not just “there”; they achieve the status of being persons, it seems, in a distinctly personal way. But there are also paradoxes here, I think. A person is created by caring and believing; but caring and believing are activities or qualities of persons. So how can there even be caring and believing unless the person is already present?

In addition, the observation that beliefs and persons are “constructed” or “created” may feed into the previous concern. How do we know that we are not simply constructing ourselves and our beliefs to suit our needs and desires—including our need to believe that life and the world have meaning and purpose and are not given over to “the senseless, the mad, the empty”?⁵⁴

VI.

Joe is aware of these and similar difficulties, I think, and indeed he often wonders and worries about our capacity for self-deception. Self-deception or “conscious illusion” is always a possibility, he thinks, and one that in fact is often realized in our believing and our acting.⁵⁵ Nor does he shy away from doubt: although he uses the word “know,” he does not actually seem to expect much certainty on these matters—surely not any cheap or easy certainty. His own writing is, as he puts it, a “distillation of vacillations.”⁵⁶

On the contrary, it is “the mathematical form of thought” that promises “stability” and “an end to uncertainty”⁵⁷; this is indeed “the temptation of the mathematical.”⁵⁸ The personalist view, by contrast, can-

51. See VINING, *supra* note 30, at 152-53.

52. See *id.* at 148.

53. See *id.* at 157.

54. See VINING, *supra* note 1, at 43.

55. See, e.g., VINING, *supra* note 24, at 110-31; VINING, *supra* note 1, at 34, 145, 200 (“As in all large matters, there is a mixture, the usual combination, of doubt and belief, made easier to live with, as usual, by strong doses of self-deception.”). However, Joe doubts the possibility that *everything* is deception. “Deception is deception only against the possibility of truth. If truth never is, neither is there deception.” *Id.* at 141.

56. See VINING, *supra* note 1, at 343.

57. See *id.* at 54.

58. *Id.* at 73.

not promise these comforts. We live “[i]n a world of faith that something is there to be known but little direct assurance that it is known.”⁵⁹

Consequently, Joe often emphasizes the need for “faith.”⁶⁰ However, clarifications are needed to avoid misunderstanding this call for “faith” (which Joe acknowledges is “a notion in some academic trouble”⁶¹).

First, Joe is clearly not using the word in the deprecating Pudd’nhead Wilson sense in which “faith is believing what you know ain’t so.”⁶² Nor is there any divide for Joe between “faith” and “reason,” or “faith” and empirical evidence. On the contrary, he stresses that a belief in the personal, and in the transcendently personal, is itself more faithfully empirical than the naturalistic insistence on ignoring or explaining away much that we do in fact experience.⁶³

Part of what we in fact experience is a sense of what is “variously described as grace calling to free man, conscience calling to fallen man, the authentic calling to the inauthentic.”⁶⁴ Indeed, even the meaningful denial of God may depend on some experience of what is being denied, and may thus provide some evidence of God.⁶⁵ Once again, the point is not the logical one of the Ontological Argument, in which the denial of God is said to contradict and thus negate itself, but rather a more experiential observation about what people really believe.

Second, Joe conceives of acts of faith being validated by the experience which they produce. Our creating is not unconstrained or *ex nihilo*, and believing and constructing are for him not distinct activities.⁶⁶ We “construct” persons and beliefs, he suggests, on the hope and the assumption that there is something there to warrant and confirm our construc-

59. See *id.* at 277; see also *id.* at 179 (“We do not know where the presences of which we are conscious begin and end. They are not things. We do not fully grasp them.”).

60. E.g., VINING, *supra* note 1, at 34.

61. *Id.* at 110.

62. MARK TWAIN, FOLLOWING THE EQUATOR: A JOURNEY AROUND THE WORLD 132 (1899).

63. See VINING, *supra* note 1, at 34-35, 183; see also *id.* at 144 (“The biologist of the positive assertion simply excludes from the evidence his own experience of love, or meaning, or purpose, of language, of death, of beauty.”); *id.* at 329-30 (“The world is full of oddnesses and incongruities, and this is not the least of them, this departure from the empirical taken by so many whose chief pride is their empiricism.”).

64. See *id.* at 332.

65. The discussion of what God is would be discussion of experience, not of a concept or of the definition of a word. And as the discussion proceeded, if the person asserting “There is no God” did seem to the listener to know what he was denying the existence of, that person so speaking would more and more be evidence to the listener of the existence of God and to be asserting the existence of God in his denial of it.

Id. at 140.

66. *Id.* at 186 (“But, in law or elsewhere, one must believe in the person or meaning assumed, before person or meaning can be created. Only if there is belief can there be creation.”).

tion,⁶⁷ and if we are right we find that the constructing is also “a merging with something beyond us that is not us and acts through us”⁶⁸

Joe attempts to illustrate this somewhat elusive claim with the example of music.

The voice that speaks through a modern instrument is not the original voice, in the sense that it is the same voice (any more than Shakespeare spoken without Elizabethan accent and pronunciation is the same). It is a voice merged with our own. But we cannot say that because the voice is not the same in this sense, we then do not hear the voice or it is not the voice of the composer that we hear.⁶⁹

Something analogous happens, he suggests, with belief in law, which presupposes an authority beyond the finite, selfish, long-since-dead humans who wrote and voted for the words printed in the Constitution or the statute books.⁷⁰

So if there is an answer to the doubts I have raised about Joe’s personalist approach, I think the answer itself will ultimately be a personal one. Which seems fitting. We act without certainty but with faith—faith that there is some sort of authority in law, and faith that the universe is more than mindless particles in pointless motion. Both as lawyers and as persons, we believe (in part because we necessarily presuppose) that there is “spirit,” or “mind,” or a transcendent something or someone who is personal, and who is caring and cognizant of our halting, uncertain efforts.⁷¹ Without this faith, we would remain oblivious: that is because “[m]ind is not known before it is searched for.”⁷² In acting on this faith, we do not act blindly, moreover, but rather on the basis of careful examination into what we really believe and who we are, and into what is presupposed by what we do and say and believe. Still, we *might* be deceiving ourselves. And if so, our faith—and our lives—will remain bare and ultimately meaningless.

But if our faith is well-founded, then we will find ourselves engaged with an authoritative, caring mind that “draws [us] into the spirit of it.”⁷³ And so it will turn out that “the first and last thing we know, the ultimate object of knowledge and belief, is a person”

67. *See id.* at 141, 336 (“That the reader is constructing and joining that which is living beyond is assumed, unnoticed while the work continues”).

68. *Id.* at 190.

69. *Id.* at 332-33.

70. *Id.* at 157, 200, 222.

71. *Id.* at 157, 200, 222.

72. *Id.* at 179.

73. *Id.* at 157.